SUPREME COURT, U. S.

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In The

Supreme Court of the United States

October Term, 1961

No. 973

NATIONAL BISCUIT COMPANY,
Petitioner,

—*vs.*—

THE STATE OF NEW YORK,
Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

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NATIONAL BISCUIT COMPANY,
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—*vs.*—

THE STATE OF NEW YORK,
Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above case on March 21, 1962.

Opinions Below

The opinion of the Court of Claims of the State of New York (R. pp. 17-28) is reported at 24 Misc. 2d 106. The opinions of the Appellate Division of the Supreme Court of the State of New York (R. pp. 268-270; 301-302) are reported at 12 AD 2d 598 and 14 AD 2d 729. The opinion of the Court of Appeals of the State of New York (App. p. 13) is reported at 11 NY 2d 743.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was made and entered on March 21, 1962 and a copy thereof is appended to this petition in the Appendix

at page 14. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3).

Questions Presented

Petitioner is the owner of property which abutted on Oswego Boulevard, a highway in the City of Syracuse, New York. A part of this property was appropriated by the State of New York in April, 1957 as part of a project which involved lowering the grade of Oswego Boulevard some 45 feet at the point where petitioner's property abutted thereon, and converting Oswego Boulevard into a limited access highway. Direct access to this highway from petitioner's remaining property was thereby rendered impossible.

Petitioner duly filed its claim with the Court of Claims of the State of New York. After trial before Hon. Charles T. Major, a decision was rendered awarding to petitioner the sum of $51,600.00, with interest, for all damages, actual and consequential, sustained by reason of the appropriation herein and judgment entered thereon. This judgment was subsequently modified on appeal to the Appellate Division Fourth Department, by reducing the sum awarded, to $2550.00, stating (R. Fol. 905):

> "Subsequently, in *Selig v. State of New York* 10 N. Y. 2d 34, it was held that where an abutting property owner has free and uninterrupted access to a so-called adjoining service road there was no change of grade as to the property and the claimant had no right, vested or otherwise, to abut upon the arterial highway."

The holding of the Court of Appeals in *Selig* v. *State of New York*, 10 N. Y. 2d 34, petitioner will hereafter show, constituted a reversal of the previous law on this subject.

This judgment was affirmed upon appeal to the Court of Appeals in the State of New York, also on the basis of

the holding in the case of *Selig* v. *State of New York*, 10 N. Y. 2d 34.

The questions presented here are:

Is it not a violation of that clause of Section 1, Amendment 14 to the Constitution of the United States which states: "Nor shall any state deprive any person of life, liberty, or property without due process of law", and of the provisions of Amendment 5, which states: "Nor shall private property be taken for public use, without just compensation", made applicable to the States by Amendment 14, for the State of New York to deprive petitioner of its access to the highway upon which its property abuts without compensating petitioner therefor?

Is petitioner not entitled to compensation for loss of the right of access to the main highway upon which its property abutted which was guaranteed to it under the decisions of the New York Courts at the time it purchased the property and so remained until the decision of the Court of Appeals in *Selig* v. *State of New York*, 10 N. Y. 2d 34, on the ground that such rights were acquired by contract and as such have come under the protection of Article 1, Section 10 of the Constitution of the United States and cannot be taken from petitioner without payment of compensation?

Constitutional Provisions and Statutes Involved

The pertinent portions of Section 29 of the Second Class Cities Law of the State of New York (Vol. 52, McKinney's Laws of New York, page 61) is set forth in the Appendix at page 16.

The pertinent portions of Article 1, Section 10, of the Constitution of the United States are set forth in the Appendix at page 16.

The pertinent portions of Amendment XIV to the Constitution of the United States are set forth in the Appendix at page 16.

The pertinent portions of Amendment V to the Constitution of the United States are set forth in the Appendix at page 16.

Statement

This action was commenced by petitioner in the Court of Claims of the State of New York to recover compensation for land appropriated by the State of New York for highway purposes and for consequential damages to the remainder of petitioner's property resulting therefrom. An award of $51,600.00 made by the trial Court was reversed by the Appellate Division of the Supreme Court and reduced to $2,550.00, stated to be compensation for the land appropriated. The Court vacated so much of the original award as constituted compensation to petitioner for consequential damages resulting from loss of access and change of grade of the highway upon which petitioner's premises abutted at the time of the appropriation.

The Appellate Division, as a basis for its decision, cited the decision of the New York Court of Appeals in *Selig* vs. *State of New York*, 10 N. Y. 2d, 34, a decision which effected a substantial change in the case law applicable to the rights of the owners of property abutting on highways in the State of New York. The affirmance of this Judgment by the Court of Appeals was likewise based upon the decision in the *Selig* case.

The facts are virtually uncontested. Petitioner's property on Oswego Boulevard had a frontage of 191.66 feet on Oswego Boulevard on the east, 175 feet on North Clinton Street on the west and 250 feet on Spencer Street,

on the north. (36, 37).* Oswego Boulevard as originally constructed and maintained up to the time of its reconstruction by the State of New York in 1957, adjoined and abutted upon the property of the claimant. From 1929 when petitioner first purchased this property up to the end of 1957, when the State of New York constructed a new arterial highway, the property now owned by claimant was at the same grade as the pavement of Oswego Boulevard. At no time after Oswego Boulevard was originally paved in about 1929 until its reconstruction at the end of 1956-57 had the grade of Oswego Boulevard been altered or changed. (78, 79).

At the time of the appropriation and for many years prior thereto, the right-of-way of Oswego Boulevard was 80 feet wide and it was possible for motor vehicles to make complete use of the 80-foot right-of-way and landowners on both sides of the boulevard had direct access to the roadway. (80).

In the course of the construction of the new arterial highway the State lowered the established grade of Oswego Boulevard a distance of 15 feet in the area of claimant's property. (66, 94, 111). As a result of the construction of the new arterial highway a retaining wall separates the new depressed roadway from direct access to the claimant's property from said arterial highway (94, as amended by the Appellate Division, fol. 215). As a result of the change of grade in Oswego Boulevard claimant now has no frontage on or direct access to Oswego Boulevard or to any principal artery transporting traffic north and south and claimant's only access on the east is to a "service road" constructed by the State which is 32 feet in width. (95).

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* Figures in parentheses refer to folios in record.

The constitutional question as to the taking of property without just compensation was first raised on the trial of the action and was ruled upon by the trial court in its findings and conclusions (125-128). The constitutional question as to the contractual rights of the petitioner was raised immediately upon its occurrence when the New York Court of Appeals decision in *Selig* vs. *State of New York*, 10 N. Y. 2d, 34 effectively overruled and negated the rights which petitioner had acquired under the law as expressed by that Court in *Schobel v. O'Brien*, 230 N. Y. 277, 281; *Donahue v. Keystone Gas Co.*, 181 N. Y. 313, 316; and *Story v. New York Elevated Railroad Co.*, 90 N. Y. 122. When the New York Court of Appeals handed down its decision on the *Selig* case, a decision on reargument of this case was pending in the Appellate Division of the New York Supreme Court. Therefore, petitioner's first opportunity to argue this point was at the next stage of the proceedings, in the New York Court of Appeals and it was raised at that point and ruled upon by that Court in its memorandum of decision (Appendix page 15).

Reasons for Granting the Writ

Petitioner rests its appeal for a hearing before this Court on two grounds — each of which in turn rests upon a decision of this Court.

Petitioner is one of many property owners enmeshed in the web-like development of the limited access highway. Its right of access was evaluated by the Court of Claims of the State of New York. The higher Courts of that State, overwhelmed perhaps by the number of instances in which property owners have suffered similar losses, determined to reverse the rule of long standing which afforded property owners so situated compensation for their losses. As a result the award which the Court of Claims had made to petitioner to compensation for the consequen-

tial damage to its remaining property, was wiped out. The New York Courts have now in effect said to the abutting property owner, "You have no right of access to the highway upon which your property abuts."

This is the precise situation which was brought before this Court, prematurely, in *Mattia v. Cravey*, 360 U. S. 219. There, the Court stated:

> "At least one additional reason for abstention in the present case is to be found in the complex and varying effects which the contemplated state action may have upon the different landowners; others may have access to existing roads or service roads to be constructed; still others may have access to the highway itself through points of ingress and egress established under the statute. In the state court proceedings the case of each landowner will be considered separately, with whatever particular problems each case may present.
>
> "There is no reason to suppose that the Commonwealth of Pennsylvania will not accord full constitutional scope to the statutory phrase 'actual taking of property.' If, after all is said and done in the Pennsylvania Courts, any of the plaintiffs believe that the Commonwealth has deprived them of their property without due process of law, this Court will be here."

National Biscuit Company, petitioner herein, has pursued all of the remedies afforded to it by the Courts of the State of New York. It has failed in these courts to secure the rights of compensation guaranteed to it by the Constitution of the United States. To paraphrase the concluding remarks of Mr. Justice Stewart in *Mattia v. Cravey*, 360 U. S. 219, 225, all has been said and done in the Courts of New York State, and petitioner does believe that the State has deprived it of its property without due process of law.

Petitioner is here, asking this Court to review the acts which it believes have deprived it of its Constitutional

rights. We are confident that this Court will not only "be here" but be ready and willing as well to assure petitioner that the rights guaranteed to it by the United States Constitution are fully protected by granting the writ and reviewing this case on the merits.

In *Story* v. *New York Elevated Railroad Co.*, 90 N. Y. 122, the New York Court of Appeals stated at pages 146 and 147:

> "But what is the extent of this easement? What rights or privileges are secured thereby? Generally it may be said it is to have the street kept open, so that from it access may be had to the lot, and light and air furnished across the open way. * * *
>
> "The easement is property within the meaning of the Constitution and the statutes authorizing the construction of the defendant's road; as well as the warehouse upon the lot, by which it was used and enjoyed, and the owner is, in the language of the Act of 1850 (Chap. 140 §§ 14, 15, 18), a person having an 'estate or interest in real estate so that if proceedings were instituted to condemn the street for railroad uses he would, as one of those persons, whose estate or interests are to be affected by the proceedings,' be entitled to notice of the same (§ 14) and compensation (§ 16)."

Again in Matter of *Schaibel* v. *O'Brien*, 230 N. Y. 277, the New York Court of Appeals stated:

> "Over the whole street as appurtenant to his land, he had at least easements of light, air and access (citing cases). These easements were property of which he could not be deprived without compensation and without due process of law."

And in *Arverne Bay Construction Co.* v. *Thatcher*, 278 N. Y. 222 the same Court said:

> "The Legislative power of the State is, however, not plenary but is limited by the Constitution of the United States and the Constitution of the State of New York. It may not take private property without compensation even for a public purpose and to advance the general welfare."

It is clear, therefore, that under New York Law, at least as it existed prior to the *Selig* case, petitioner had a right of access to the street upon which his property abutted. That this right is a valuable one is attested by the fact that an award of $51,650.00 was made for the land and rights appropriated and only $2,650.00 for the land alone.

Petitioner does not ask this Court to ascertain the damage sustained. That is a function of the State Court which has been performed. The value of petitioner's right has been established. But the State Courts then refuse to compensate petitioner at all for it.

That is contrary to the decisions of this Court in many cases. In *Pennsylvania Coal Co. v. Nelson*, 206 U. S. 383, this Court stated at page 415:

> "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. *Barston v. Danville & Western Ry. Co.*, 208 U. S. 598, 607. When this seemingly absolute protection is found to be qualified by the police power, for natural tendency of human nature is extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States."

And in *Chicago, Burlington & Quincy Railroad Co. v. Chicago*, 166 U. S. 226 this Court stated at page 241:

> "In our opinion a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principal and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest

court of the State is a denial by that State of a right secured to the owner by that instrument."

And in *United States* v. *Virginia Electric & Power Co.*, 365 U. S. 624, dealing with the condemnation of an easement by the government of the United States, Mr. Justice Stewart reaffirms the principle of indemnification underlying the Fifth Amendment, stating:

> "The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity.' . . ." *United States* v. *Commodities Corp.*, 339 U. S. 121, 124; see *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 324-326. The result contended for by the Government would hardly comport with those standards."

Certainly the results achieved in the case at bar by the decision of the New York Courts do not comport with those standards either.

A second basis for review by this Court of the decision of the New York Court of Appeals, rests upon the decision of this Court in *Muhlker* v. *Harlem Railroad Co.*, 197 U. S. 571 wherein Mr. Justice McKenna stated, at page 579:

> "When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases and could not be taken from him without payment of compensation.
>
> "And this is the ground of our decision. We are not called upon to discuss the power of the legislature upon the power of the Courts of New York to declare rules of property or change or modify them by decisions but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of state decisions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the elevated rail

road cases and the doctrine they had pronounced when the plaintiff acquired the property. He bought under their assurances, and that these decisions might have been different or that the plaintiff might have balanced [illegible] of inconvenience or advantage between the right to have the street remain open and the expectation [illegible] is impossible to estimate, or certainly to estimate the difference between a street with its access of light and air and one with those easements impaired or prejudiced, but we have already expressed this. We need only add that the right of passage is not all there is to a street, and to call it the primary right is more or less derisive. It is the most [illegible] and the importance and assertion of [illegible] interest and ownership, property has a natural dominance, but if is not more necessary to the use of a city than the rights to light, air, etc., although the latter are in individual ownership and assets only as rights of private property, the true policy and [illegible] tion of these rights, public and private, is expressed not only by the elevated railroad cases, but by other cases. They are collected in 1 Lewis' Eminent Domain, Section 171, and it is there said: 'established beyond question by a long line of decisions that easements of light, air and access are important to abutting lots, and that they are as much property as the lots themselves.'"

As we have pointed out above, the City of New York at the time petitioner purchased the property in question had been established by the decisions of the Court of Appeals as *Donahue v. Keap*, 181 N. Y. 313; *Rutten et Schiebel v. O'Brien*, 200 N. Y. 277 and *Story v. New York Elevated R. R. Co.*, 90 N. Y. 122.

The statement of that court in *Donahue v. Keap Gas Co.*, 181 N. Y. 313, 316 is representative of this [illegible]

"While the control of the street is [illegible] the public authorities and that may [illegible] it even to its detriment, still the [illegible]

are a species of property that cannot be taken from him without compensation awarded according to the law of the land. (*Story v. N. Y. Elev. R. R. Co.*, 90 N. Y. 122, 179).

The rights or easements of light, air and access were acquired by petitioner when it purchased its property. When petitioner acquired title the law of New York was expressed in the cases cited above. Its easements of light, air and access were thereby secured by judicial contract and they could not be taken from it without payment of just compensation as provided by the Constitution of the United States.

The attempt by the New York Court, by judicial fiat, to strip petitioner and others similarly situated, of the rights acquired on purchase of its property, without compensation, constitutes a violation of the rights guaranteed it under the Constitution of the United States.

For this reason as well as for those previously cited, it is submitted that this Court should grant the writ of certiorari herein applied for and review this case upon its merits.

CONCLUSION

For the reasons set forth above it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX.

Memorandum Decision of New York State Court of Appeals.

Judgment affirmed with costs (Seelig v. State of New York, 10 N. Y. 2d 340). This Court certifies that there were presented and necessarily passed upon questions under the Constitution of the United States, viz: the appellant contended that it has been deprived of its property without just compensation in violation of due process and that the alleged appropriation constituted an impairment of its contractual rights under the Constitution of the United States. This court held that appellant's constitutional rights had not been violated. No Opinion.

CONCUR: Chief Judge Desmond and Judges Dye, Fuld, Froessel, Van Voorhis, Burke and Foster.

Judgment on Decision of New York State Court of Appeals.

The above named claimant-appellant having appealed to the Court of Appeals from a judgment following appeal to the Appellate Division, Fourth Judicial Department, entered in the Clerk's Office of the Court of Claims on October 3, 1961, which judgment modified the judgment of the Court of Claims entered on August 17, 1960, in favor of the claimant and against the State of New York in the sum of $5,525.87, and reduced the award to the sum of $2,550.00, with interest, and the said appeal having been argued by Costello, Cooney & Fearon, Esqs., attorneys for the claimant-appellant by George R. Fearon, Esq., of counsel, and by Hon. Louis J. Lefkowitz, Attorney General, for the defendant respondent, The State of New York, Julius L. Sackmann, Esq., Assistant Attorney General, of counsel, and after due deliberation the Court of Appeals having handed down its decision on February 7, 1962 affirming the judgment appealed from with costs (Selig v. State of New York, 10 NY 2d 54) certifying that there were presented and necessarily passed upon questions under the Constitution of the United States, viz: the appellant contended that it has been deprived of its property without just compensation in violation of due process and that the alleged appropriation constituted an impairment of its contractual rights under the Constitution of the United States, the Court of Appeals holding that appellant's constitutional rights had not been violated, all concurring; and having further ordered that the record

Judgment on Decision of New York State Court of Appeals

and proceedings be remitted to the Court of Claims of the State of New York, there to be proceeded upon according to law;

And the original record on appeal together with a certified copy of the order of the Court of Appeals entered in the Clerk's Office thereof on February 22, 1962, having been filed in the Clerk's Office of the Court of Claims on March 2, 1962; and the costs having been waived, it is

ORDERED AND ADJUDGED that the judgment entered in the Clerk's Office of the Court of Claims on October 3, 1961, modifying on the law and the facts, the judgment of the Court of Claims entered on August 17, 1960, and awarding the National Biscuit Company, the above-named claimant, against the State of New York, the sum of Three Thousand Seven Dollars and Thirty Cents ($3,007.30), be and the same hereby is, affirmed as aforesaid.

JOHN J. CLARK
Clerk of the Court of Claims

Dated: Albany, N. Y.
March 21, 1962

Article 1, Section 10 of the Constitution of the United States (excerpt).

"No State shall * * * pass any * * * Law impairing the obligation of contracts, * * *."

Amendment V to the Constitution of the United States (excerpt).

"No person shall be * * * deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV to the Constitution of the United States, Section 1 (excerpt).

"* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 99, Second Class Cities Law of State of New York

"The grade of any street shall not be fixed or established except by direction of the common council. The grade of a street heretofore or hereafter legally established shall not be changed, except by direction of the common council, and except also upon compensation for damages done, to be ascertained in and by the proceedings provided by law for ascertaining damages for lands taken for the opening of streets. * * *."

Decision of Court of Claims.

MAJOR, J.

This claim was filed to recover damages for the appropriation by the State of New York for the use of two parcels of claimant's land, and a permanent easement over another, for purposes connected with the States Arterial Highways Passing Through Cities, pursuant to Article XII-B of the Highway Law. Prior to the appropriation, claimant was the owner of a piece of property in Syracuse, New York, with a frontage of 191.06 feet on Oswego Boulevard, 175 feet on North Clinton Street, and 250 feet on Spencer Street. In 1941, claimant built a large one-story steel frame and brick building on its land, and used the entire property as a wholesale bakery and distribution center of its products.

Oswego Boulevard came into being as a result of the State abandoning Oswego Canal and selling and conveying the canal lands to the City of Syracuse. In 1929, the City of Syracuse named Oswego Boulevard, established its grade and paved it for highway purposes. As a result of its location and construction, it became and for many years was a heavily traveled main artery between downtown Syracuse and points to the north.

At the time of the appropriation herein, on April 9, 1957, the claimant's premises were at the same grade as Oswego Boulevard which was 80 feet wide. It was possible for motor vehicles to make complete use of the 80 feet right of-way, and land owners on both sides of the boulevard had direct access to the roadway.

In about 1956, the State closed the boulevard for the construction of a new arterial highway, and in accordance with plans, lowered the grade of Oswego Boulevard and depressed it a distance of 15 feet in the area of claimant's property. As a result of the change of grades claimant

now has no frontage on and no direct access to Oswego Boulevard. A retaining wall separates the new depressed roadway from direct access to the claimant's property. The only access the claimant has on the easterly side of its property is by way of a "service road" constructed by the State which is 32 feet wide.

The easement of access is one of the rights of the owner of land adjoining a highway, regardless of where the title may be. (Donahue v. Keystone Gas Co., 181 N. Y. 313, 316; Story v. New York Elevated Railroad Co., 90 N. Y. 122; Griefer v. Sullivan County, 246 App. Div. 385, 386; 286 N. Y. S. 791, 793, aff'd. 273 N. Y. 515) Easement of access is for ingress and egress, and is property as much as an abutting lot itself. It cannot be taken away or materially impaired or interfered with even under legislative authority without compensation. (Sauer v. New York, 180 N. Y. 27, 33, 206 U. S. 536; Donahue v. Keystone Gas Co., supra)

The abutting owner's easement of access does not apply only to the side on which his property abuts, but to the whole width of the street. (Scheibel v. O'Brien, 250 N. Y. 277, 281) The owner's right of access is, however, subject to such reasonable use of the street not inconsistent with its maintenance as a public highway as may be necessary for the public good and convenience, and does not seriously impair it. (Perlmutter v. Greene, 259 N. Y. 327; Sauer v. New York, supra) Public authority may impose regulations governing the exercise of such right. (Jones Beach Boulevard Estate v. Moses, 268 N. Y. 362) While an abutting owner has an easement of access to the highway, he holds the same subject to the paramount right of the State or municipality to change the grade of the

highway and there can be no recovery of damages for impairment of the easement resulting from such a change, in the absence of a statute. (Sauer v. New York, supra; Meloon Bronze Foundry, Inc., v. State, 6 App. Div. 2d 903, 176 N. Y. S. 2d 452.)

Where the State changes the grade of a highway within its own right-of-way without taking land from the abutting owner any damages suffered are damnum absque injuria, and the abutting owner has no claim unless it is authorized by legislative act. (Lewis v. State, 2[illegible] N. Y. 503; Coffey v. State, 291 N. Y. 494.)

The grade of Oswego Boulevard was established by the City at the location of claimant's property and remained at such grade until the State altered and reconstructed this highway. The State appropriated a part of claimant's land for the project. In addition, Section 20 of the Second Class Cities Law applies to the City of Syracuse. This section provides that a grade of a street legally established in Syracuse cannot be changed except by an ordinance of the Common Council and payment of compensation for damages done, to be ascertained in and by proceedings provided by law for ascertaining damages.

While the State had the authority to relieve the City of Syracuse of the Oswego Boulevard, nevertheless, the liability therefor has not been extinguished. The State has assumed it and is liable to claimant for the damages sustained thereby.

Separate findings and conclusions of law in which damages are awarded to claimant are filed herewith.

Dated: June 30, 1960.

Decision of Appellate Division.

MEMORANDUM:

The award herein was made prior to our decision in *A. E. Nettleton Company v. State of New York*, 11 App. Div. 2d, 899. Therein we said (p. 900) that "No damages should be awarded on the theory of loss of access or interference therewith, loss of traffic from immediately in front of the property, or loss of view by boulevard users." See also *Hall & McChesney v. State of New York*, 15 Misc. 2d 748, affd. 11 App. Div. 2d, 899, leave to appeal denied 11 App. Div. 2d, 977, 8 N. Y. 2d, 710. The trial court herein by its findings and decision considered these elements in fixing the amount of claimant's damage. Furthermore, the claimant's experts in fixing the value of the property after construction of the boulevard similarly considered loss of access, lost frontage and loss of view. It follows that the award may not be sustained.

There was presented herein, however, an element of damage that was not considered or passed upon in our decision in the *Nettleton case, supra* (11 A. D. 2d, 899). Section 99 of the Second Class Cities Law provides in part that, "The grade of a street * * * shall not be changed * * * except also upon compensation for damages done * * *." The statute here applicable provides that the cost of acquisition of property and any liability incurred by reason thereof shall be paid by the State as provided by section 30 of the Highway Law (Highway Law § 349-a, sub. 2, 6). Subdivision 15 of section 30 provides that if the work of constructing such state highways causes damage to property not acquired "the state shall be liable therefor, but this provision shall not be deemed to create any liability not already existing by statute."

These statutory provisions were considered in Selig v. State of New York, 12 App. Div. 2d, 685, where it was said (p. 689): "The court below found that under the provisions of the Highway Law it was sufficient that the City of Yonkers would have been liable had it caused the change of grade and that the claimant need not actually have a claim against the city. The State, having caused the change of grade, it assumed liability. It was not the intendment of the law to absolve the State from liability under such circumstances." See also *Goodbody v. State of New York*, 18 Misc. 2d 514.

We agree with the findings of the trial court that the highest and best use of claimant's property is for commercial or industrial purposes. Thus considered and eliminating the elements of loss of access or interference therewith, or loss of view, we express no opinion as to the extent claimant may have been damaged by lowering the boulevard some 15 feet in front of its property. This issue may only be resolved upon a new trial when the court should make separate findings of the value of the land taken and the damage, if any, sustained by claimant by the change of grade (Cross-appeals from judgment of Court of Claims, Major, J., for claimant on a claim for damages for appropriation of realty).

Present:

Williams, P. J., Bastow, Goldman, McClusky and Henry, JJ.

Memorandum Decision of Appellate Division On Reargument.

National Biscuit Company, Respondent-Appellant, v. The State of New York, Appellant-Respondent. Order of this court dated February 23, 1961, vacated. Upon reargument, judgment of the Court of Claims dated August 17, 1960, modified on the law and facts to reduce the amount of claimant's recovery to the sum of $2,550.00 with interest thereon from the 9th day of April, 1957, and as so modified affirmed, without costs of this appeal to either party. Certain findings of fact and conclusions of law disapproved and new findings and conclusions made. Memorandum. In our prior decision in this case (12 App. Div. 2d 998) we directed that a new trial to determine what damage, if any, claimant had sustained by reason of the change of grade of an arterial highway in front of its property. Subsequently, in Selig v. State of New York, 10 N. Y. 2d 34, it was held that where an abutting property owner has free and uninterrupted access to a so-called adjoining service road there was no change of grade as to the property and the claimant had no right, vested or otherwise, to abut upon the arterial highway. We construe that holding to be here controlling. Upon reargument claimant has raised certain issues, apparently not presented in the Selig case, *supra*, as to its constitutional rights to be compensated for loss of access to an adjoining highway. We have examined these questions and find them to be without validity. In our opinion, claimant's award should be reduced to the amount of land actually taken in fee or by easement. Both experts called by claimant testified that such amount was the sum of $2550.00. (Reargument of cross-appeals from judgment of Court of Claims, Major, J., for claimant on a claim for damages for appropriation of realty.) Present, Williams, P. J., Bastow, Goldman, McClusky, and Henry, JJ.

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IN THE

Supreme Court of the United States

No. 973—October Term, 1961

NATIONAL BISCUIT COMPANY,
Petitioner

against

THE STATE OF NEW YORK,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Opinions Below

The opinion of the Court of Claims of the State of New York (MAJOR, J.), dated June 30, 1960, is reported at 24 Misc. 2d 106, 203 N. Y. S. 2d 462 (R. pp. 17-28; Appendix to Pet., pp. 17-19).

The memorandum decision of the Appellate Division of the Supreme Court of the State of New York, Fourth Department, dated February 23, 1961, is reported at 12 A. D. 2d 998, 211 N. Y. S. 2d 435 (R. pp. 268-270; Appendix to Pet., pp. 20-21).

The memorandum decision of the Appellate Division of the Supreme Court of the State of New York, Fourth Department, upon reargument, dated September 22, 1961, is reported at 14 A. D. 2d 729, 219 N. Y. S. 2d 905 (R. pp. 301-302; Appendix to Pet., p. 22).

The memorandum decision of the Court of Appeals of the State of New York, dated February 22, 1962, is reported at 11 N. Y. 2d 743, 181 N. E. 2d 457 (Appendix to Pet., p. 13).

Jurisdiction

Petitioner invokes the certiorari jurisdiction of this Court under 28 U. S. C. § 1257(3).

Questions Presented

In *Selig* v. *State of New York*, 10 N. Y. 2d 34, 176 N. E. 2d 59 (1961), the Court of Appeals held that there was no change of grade and that the claimant had no right, vested or otherwise, to abut upon a 100-foot wide highway. Diversion of traffic and circuity of access were held to be *damnum absque injuria*. The decision in the case at bar was based upon *Selig*. The petitioner raises the question whether the failure of the Court of Appeals to recognize liability in this case does not deprive it of due process of law and just compensation.

The petitioner also asserts that it was entitled to compensation for loss of the right of access to the main highway upon which its property abutted under the decisional law in existence at the time it purchased the property, and that by virtue of such alleged decisional law its right to compensation was "guaranteed". Upon the assertion that the decision of the Court of Appeals in the *Selig* case overruled and changed the prior decisional law it now inquires of this Court whether such change in the law does not violate the constitutional provision dealing with the impairment of the obligation of a contract.

Constitutional Provisions and Statutes Involved*

U. S. Constitution, Art. I, § 10; Amendments V and XIV.

Second Class Cities Law of State of New York § 99 (Vol. 52, McKinney's Laws of New York, page 61).

Statement

The decision in the case at bar was based on the prior decision of the Court in *Selig* v. *State of New York*, *supra*. In *Selig* the center section of an existing street, 100 feet wide, upon which the east side of the claimant's land abutted, had been changed to a limited-access highway and elevated between 6½ and 11 feet above the established grade. However, the claimant's land retained on its east side free and uninterrupted access to a service road for southbound traffic. The service road was 27 feet wide and, concededly, was at the same grade as the original street. The streets which bounded the land on the north and west sides thereof were unaffected.

The facts in the case at bar were identical with *Selig* except that the center expressway section of the highway was depressed 15 feet and the contiguous service road was 32 feet wide.

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* The pertinent provisions are set forth in the Appendix to the Petition, page 16.

ARGUMENT

POINT I

The judgment does not violate the "due process" or "just compensation" provisions of the Constitution.

Petitioner contends that the failure of the Court of Appeals to recognize liability for the alleged change of grade and its concomitants, diversion of traffic, circuity of access and loss of view, constitutes a violation of the constitutional provisions relating to "due process" and "just compensation".

Insofar as the alleged change of grade is concerned the Court of Appeals found in the instant case, as it did in *Selig* v. *State of New York*, 10 N. Y. 2d 34, 176 N. E. 2d 59 (1961), that there was no change of grade. Insofar as consequential damages were claimed by reason of circuity of access, diversion of traffic, loss of view, and the fact that petitioner's property does not abut or front directly upon the expressway section of the arterial highway, the Court of Appeals affirmed on the basis of *Selig supra*, in which it had held that such elements are not legally cognizable or compensable factors.

The judicial determination of compensability or the extent thereof does not create any question under the constitutional provisions. The question of whether an injury is *damnum absque injuria* or the question of the amount of compensation which is to be paid to an owner by reason of an act of eminent domain is a judicial question (*Chicago, B. & Q. Co. v. Chicago*, 166 U. S. 226, 246 [1897]; *McCoy v. Union Elevated R. R. Co.*, 247 U. S. 354, 363 [1918]).

This Court has held that as long as compensation is made or provided for, the determination of the amount of the compensation does not present a substantial Federal question under the due process provision of the Fourteenth Amendment (*Appleby v. Buffalo*, 221 U. S. 524, 531-533 [1911], affg. 189 N. Y. 163, 81 N. E. 954 [1907]). In the cited case the Court of Appeals had held in a condemnation proceeding that the condemnee was entitled only to nominal damages.

In *Provo Bench Canal Co. v. Tanner*, 239 U. S. 323 (1915), affg. 40 Utah 105, 121 Pac. 584 (1911), this Court held that in eminent domain proceedings an award of one dollar for property taken for an easement does not deprive the owner of his property without due process of law if the State Court recognized the right to recover for any substantial damage, but found as a matter of fact that no damage whatever had been shown.

Dispositive of the claim of alleged deprivation of due process is *McGovern v. City of New York*, 229 U. S. 363, 370-371 (1913), affg. 195 N. Y. 573, 88 N. E. 1132 (1909), which involved the validity of an award in a condemnation proceeding. Mr. Justice Holmes, writing for the Court, said that not every judgment by which a man gets less than he ought to and in that sense is deprived of his property can come to this Court. He added that when property is taken by eminent domain there must be something more than an ordinary honest mistake of law in the proceedings for compensation before a party can make out that the State has deprived him of his property unconstitutionally.

POINT II

Assuming, *arguendo*, that the decision of the Court of Appeals in *Selig* v. *State* constituted a reversal or overruling of prior decisional law, such reversal does not constitute an impairment of any "contract" based upon the prior law.

Analysis of *Selig* v. *State*, *supra*, reveals that the decision of the Court of Appeals was declaratory of the existing law. No principles of liability were either explicitly or implicitly overruled. Even the dissenting Judges did not disagree with the conclusion of the Court on the question of law. They merely held that the question of change of grade had been affirmatively found, *as a fact*, by both Courts below and, therefore, was not open to review in that Court. This affords cold comfort to the petitioner in the case at bar because in the instant case the Court of Appeals, upon the authority of *Selig* v. *State*, has held that there was no change of grade.

Petitioner now injects a contention that the decision of the Court below in the instant case* results in a violation of the provision of the Federal Constitution, Art. I, § 10, Cl. 1, that

> "No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *."

Assuming, *arguendo*, that the decisions in *Selig* and in the case at bar did change prior decisional law, it must be observed that the term "Law" in the constitutional provision comprises statutes, constitutional provisions, municipal ordinances, and administrative regulations having the

* Necessarily, this contention is also addressed to the Court's determination in *Selig* v. *State*, *supra*.

force and operation of statutes. (As to statutes and State constitutional provisions: *Bier* v. *McGehee*, 148 U. S. 137, 140 [1893]; as to municipal ordinances: *Cuyahoga Power Co.* v. *City of Akron*, 240 U. S. 462 [1916]; as to administrative regulations: *Appleby* v. *Delaney*, 271 U. S. 403, 409 [1926].)

How is it as to judicial decisions? Not only does the abstract principle of the separation of powers forbid the idea that the Courts "make" law, but the word "pass" in the constitutional provision connotes that the concept of law is confined to the formal and acknowledged methods of exercise of the legislative or law-making function. Accordingly, this Court has frequently said that Art. I, § 10, Cl. 1 does not cover judicial decisions, however erroneous, or whatever their effect on existing contract rights. (*Barrows* v. *Jackson*, 346 U. S. 249, 260 [1953].)

In *Sa er* v. *City of New York*, 206 U. S. 536 (1907), it is interesting to note that the claimed "impairment" did not arise from the decision of the Court of Appeals, but from the statute which authorized the construction of the viaduct, as construed by that Court. This Court held (p. 549) that on this premise the case came within the authority of *Muhlker* v. *New York & Harlem R. R. Co.*, 197 U. S. 544 (1905), which also involved an interpretation of a statute by the New York Court of Appeals. Indeed, this very distinction was made by this Court in *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444 (1924), at pages 452-453:

> "Other cases cited are *Louisiana* v. *Pilsbury*, 105 U. S. 278, and *Muhlker* v. *New York & Harlem R. R. Co.*, 197 U. S. 544, but in each of them a statute had been passed subsequently to the contract involved and was held to impair it. In such a case this Court accepts the meaning put upon the impairing statute by the state court as authoritative, *but it is the statute as enforced*

by the State through its courts which impairs the contract, not the judgment of the court." (Emphasis added.)

After further discussion of several other classes of cases, the Court made the following distinction (pp. 453-454):

> "The difference between all these classes of cases and the present one wherein it is claimed that a state court judgment alone, and without any law, impairs the obligation of a contract, has been carefully pointed out in *Central Land Co.* v. *Laidley*, 159 U. S. 103, 111, 112, in *Bacon* v. *Texas*, 163 U. S. 207, 221, 223, and in *Ross* v. *Oregon*, 227 U. S. 150, 161. Certain unguarded language in *Gelpcke* v. *Dubuque*, 1 Wall. 175, 206; *Butz* v. *Muscatine*, 8 Wall. 575, 583, and in *Douglas* v. *Pike County*, 101 U. S. 677, 686-687, and in some other cases, has caused confusion, although those cases did not really involve the contract impairment clause of the Constitution."

Implicit in the rationale of the foregoing cases is the fundamental concept, especially true of a Court of last resort, that there is no special sanctity in precedent. Inability to correct past error, to adapt to the *mores* and progress of today, necessarily must result in stultification and a weakening of authority. "*Stare decisis*", as Mr. Justice BRANDEIS said, "is ordinarily a wise rule of action. But it is not a universal, inexorable command." (Dissent in *Washington* v. *W. C. Dawson & Co.*, 264 U. S. 219, 238 [1924].) As ROSCOE POUND put it: "Law must be stable, and yet it cannot stand still." (*Interpretations of Legal History*, p. 1.) And Mr. Justice CARDOZO: "Hardly a rule of today but may be matched by its opposite of yesterday." (*Nature of the Judicial Process* [1957 ed.], p. 26.) In the same work (CARDOZO, *op. cit., supra*) we find the following (pp. 27-28):

> "These changes or most of them have been wrought by judges. The men who wrought them used the same tools as the judges of today. The changes, as they were made in this case or that, may not have seemed momentous in the making. The result, however, when the process was prolonged throughout the years, has been not merely to supplement or modify: it has been to revolutionize and transform. For every tendency, one seems to see a counter-tendency; for every rule its antinomy. Nothing is stable. Nothing absolute. All is fluid and changeable. There is an endless 'becoming.'"

See also, CARDOZO, *op. cit., supra*, pp. 161-162 and CARDOZO, *Paradoxes of Legal Science*, p. 29.

There is no need to labor the point. Hardly a term goes by that this Court, in recognition of its proper function, does not abandon an established concept as outmoded, obsolete, ill-adapted to the exigencies of the present or ill-conceived in the first instance and slavishly adhered to by the process of judicial inertia. Fortunately, a healthy judicial skepticism can be depended upon to make the needed adjustments.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Albany, New York, May 30, 1962.

Respectfully submitted,

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